Supreme Court, U.S.
FILED
JUL 15 1980
MICHAEL RODAK, JR., CLERK

80-68

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 19____

KITTY LOUISE STROUSE and LORI GAY WINTER,
By and through her natural mother and next
friend, KITTY LOUISE STROUSE,
Petitioners,

VERSUS

GLENN DALE CARTER, Associate District Judge of the
District Court of Pottawatomie County, Oklahoma,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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July, 1980

QUESTIONS PRESENTED FOR REVIEW

1. Whether an eleven-year-old child who has been living with her natural mother for four years during the pendency of an adoption contest may be summarily removed from her family of four years and placed with her adoptive mother in another state when a hearing to determine her best interests and her preference has been requested, but denied, without violating her rights under the Equal Protection Clause of the Fourteenth Amendment, although such hearings are allowed in all other custody disputes, including those between natural parents and foster parents.

2. Whether a child who is almost twelve years old may be arbitrarily removed from the custody of her natural mother with whom she has been living for four years and placed in the custody of her adoptive mother who the court found to have procured a consent to adoption by fraud, the Supreme Court of Oklahoma having denied a request for a hearing to detedmine her best interests and her preference, without denying her rights under the Due Process Clause of the Fourteenth Amendment.

PARTIES

The parties in the Oklahoma Supreme Court were the following:

Kitty Louise Strouse and Robert D. Winter, Petitioners, and Glenn Dale Carter, Associate District Judge of the District Court of Pottawatomie County, Oklahoma, Respondent.

The petitioners herein are informed that Robert D. Winter does not desire to be named as a party herein.

The petitioner, Lori Gay Winter, by and through her natural mother and next friend, is joining as a petitioner, herein.

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No. _____

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VERSUS

GLENN DALE CARTER, Associate District Judge of the
District Court of Pottawatomie County, Oklahoma,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and order of the Supreme Court of Oklahoma entered on the 5th day of May, 1980, but not effective or filed until the 10th day of June, 1980, which appears as Appendix "A" hereto.

JURISDICTION

A judgment and order of the Supreme Court of Oklahoma was entered on the 5th day of May, 1980; however, said order was not effective or filed until the 10th day of June, 1980; and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Title 30 Oklahoma Statutes, § 11, which provides:

"In awarding the custody of a minor, or in appointing a general guardian, the court or judge is to be guided by the following considerations:

"1. By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare; and if the child be of sufficient age to form an intelligent preference, the court or judge may consider that preference in determining the question.

"2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child be of tender years, it should be given to the mother; if it be of an age to require education and preparation for labor or business, then to the father."

STATEMENT OF THE CASE

The petitioner, Kitty Louise Strouse, is the natural mother of the petitioner, Lori Gay Winter, a female child born on the 22nd day of July, 1968. At the time of the child's birth, the mother was 17 years old and unmarried. The child was adopted by the petitioner's mother and father, who are the grandparents of the child. A final Decree of Adoption was entered by the District Court of Pottawatomie County, Oklahoma, on the 28th day of February, 1972. Subsequent to the entry of the Decree of Adoption, the grandmother, Bette J. Winter, and her husband, Robert D. Winter, were divorced; and custody of the child, Lori Gay Winter, was vested in Bette J. Winter. The petitioner, Kitty Louise Strouse, filed her petition to

set aside the Decree of Adoption on the grounds that her consent to the adoption was procured by fraud; and on the 4th day of June, 1976, the District Court of Pottawatomie County, Oklahoma, entered its order and judgment setting aside and vacating the Decree of Adoption specifically finding that the adoption was procured through fraud, deceit, material misrepresentation; and that the best interests of the child would be served by returning her to her natural mother (See Appendix "C" hereto). The grandmother, Bette J. Winter, appealed to the Oklahoma Supreme Court, which reversed the trial court on the grounds that the petition to set aside the Decree of Adoption was filed after the statute of limitations had run (See Appendix "D" hereto).

Upon receipt of the mandate of the Supreme Court of the State of Oklahoma, the Honorable Glenn Dale Carter, Associate District Judge of the District Court of Pottawatomie County, Oklahoma, entered an order and judgment, finding that neither the matter or best interests of the child, Lori Gay Winter, nor the matter of substantial material and permanent change of conditions applied and that the sole and only question was to, in effect, order the surrender of the child, Lori Gay Winter, to Bette J. Winter, her grandmother and adoptive mother (See Appendix "E" hereto).

The petitioner, Kitty Louise Strouse, filed her petition in the Supreme Court of the State of Oklahoma seeking a writ of prohibition prohibiting the respondent herein from enforcing the aforesaid order, and in the alternative, a writ of mandamus requiring the respondent herein to conduct a hearing and receive evidence and testimony concerning

the best interests of the petitioner, Lori Gay Winter, before entering or enforcing any orders relating to the change of custody of said child. The order of the Supreme Court of the State of Oklahoma filed on June 10, 1980, was a denial of the application of Kitty Louise Strouse to assume original jurisdiction, petition for writ of prohibition, and mandamus. The net result of the entry of this order is that the respondent herein will not be required or allowed to conduct a hearing with regard to the best interests of the petitioner, Lori Gay Winter. She will be ordered surrendered by her natural mother in Wichita, Kansas, to her grandmother, the adoptive mother, in Oklahoma, where she will be forced to reside in an atmosphere of hostility and vindictiveness with a legal custodian who has not bothered to visit her on a single occasion during the four years she has resided with her natural mother and her family during pendency of the proceedings relating to setting aside the Decree of Adoption. The child would be uprooted and transplanted into the home of her grandmother, who has demonstrated her unfitness to have the custody of the child, without a hearing as to her best interests or an opportunity for the child to express her preference. The child's best interests, her emotional health, and her preference are of primary concern and importance.

Federal questions were raised, both at the trial court level and in the Oklahoma Supreme Court. In the petitioners' Response to Motion to Return Minor Child filed in the District Court of Pottawatomie County, Oklahoma, on June 5, 1979, there is the following language on page 2 thereof:

> "Further responding, respondents allege that in any proceeding to determine custody of the minor child,

> Lori Gay Winter, her best interests are of primary concern and to summarily order her custody transferred without a hearing on the matter of best interests would be a violation of her constitutional rights as well as a violation of the constitutional rights of the respondents in that it would be a denial of equal protection of the laws and denial of due process."

In the Petition for Writ of Prohibition and in the Alternative, Writ of Mandamus filed by the petitioners, Kitty Louise Strouse and her father, Robert D. Winter, the federal questions were again raised, where in numerical paragraph 8 thereof there is the following language:

> "In the alternative, your petitioners herein respectfully show this Honorable Court that in the event a writ of prohibition prohibiting the enforcement of said order and judgment is not granted by this Honorable Court, a writ of mandamus should be allowed by this Court, requiring the District Court of Pottawatomie County, Oklahoma, to conduct a hearing on the matter of best interests of said Lori Gay Winter before entering any orders relating to the transfer of said child, or her custody; that for more than three years the said Lori Gay Winter, who is now eleven years old, has been living with her natural mother, Kitty Louise Strouse, and her husband and two other children, in a stable, happy family environment, and to summarily order the transfer of the custody of said child to her divorced grandmother, the adoptive mother, without consideration of her best interests, would be a denial of the constitutional rights of the child, Lori Gay Winter, and the petitioners herein, and that it would violate her rights as to the equal protection of the laws and due process."

The same federal questions were again presented to the Oklahoma Supreme Court in the brief in support of Petition for Writ of Prohibition and in the Alternative Writ of Mandamus filed on the 27th day of June, 1979, by the petitioners, Kitty Louise Strouse and Robert D. Winter.

(The Petition for Writ of Prohibition and in the Alternative, Writ of Mandamus, appears in its entirety as Appendix "B" hereto.)

REASONS FOR GRANTING THE WRIT

In a dispute involving the custody of a child, Oklahoma follows the rule:

> "The legal right of the parent is subordinate, the best interests of the child is the question of foremost consideration." *Caldwell* v. *Caldwell,* 525 P.2d 641 (Okla. 1974).

The same rule is followed in cases involving children who have been residing for many years with nonparents. In *Osborn* v. *Roberts,* 169 P.2d 293 (Okla. 1946), the Oklahoma Supreme Court announced the rule:

> "When asked to take the custody from those who have for a considerable period of time nurtured and cared for the child and restore it to the parent, it is proper for the Courts to consider the ties of love and confidence that have grown up between the child and it's foster parents and whether it is best for the child not to disturb that relationship."

Although the petitioner, Kitty Louise Strouse is the natural mother of Lori Gay Winter, and that relationship

has been known by the child throughout her life, it could be said that the petitioner, Kitty Louise Strouse, became the child's foster parent when the Oklahoma Supreme Court reversed the trial court's judgment in setting aside the Decree of Adoption, and that said child is and has been residing with foster parents in a family relationship for four years where the ties of love and confidence have grown up between the child and her foster parents.

The effect of the Oklahoma Supreme Court's order in refusing to grant the Writ of Mandamus requiring a hearing as to Lori Gay Winter's best interests before ordering her custody surrendered to her adoptive mother, is a denial of the child's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. She has been denied the right to such hearing while in all other cases persons similarly situated would be afforded this right. This Court said in *Stanley* v. *Illinois*, 465 U.S. 645, 680 (1972):

> "We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause."

The denial of Lori Gay Winter's right to a hearing to determine her best interest and to give her an opportunity to express a preference as to the family with whom she shall live is a direct violation of her constitutional rights under the Due Process Clause of the Fourteenth Amendment. This Court said in *Ford* v. *Ford*, 371 U.S. 187 (1962):

> "The Virginia court held no hearings as to the custody of the children. In entering its order of dismissal, the court neither examined the terms of the parents' agreement nor exercised its own judgment of what was best for the children. The court's order meant no more than that the parents had made an agreement between themselves. Virginia law, like that of probably every State in the Union, requires the court to put the child's interest first."

In *Moore* v. *City of East Cleveland, Ohio,* 431 U.S. 494 (1977), this Court said:

> "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.
>
> "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family."

The Court also stated in said case:

> "But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case."

In *Stanley* v. *Illinois,* supra, the Court made the following statement:

> "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment."

The petitioners herein are seeking to preserve the integrity of the family unit composed of the petitioenrs, the foster father, and two other children of the marriage. The family relationship has caused the ties of love and confidence to grow among the child, Lori Gay Winter, the petitioner, Kitty Louise Strouse, and the other members of the family unit.

In the trial of the case on its merits, when the trial court entered its judgment setting aside the Decree of Adoption, the court specifically found that the best interest of Lori Gay Winter would be served by returning her custody to her natural mother, the petitioner, Kitty Louise Strouse.

The effect of the order of the Oklahoma Supreme Court is the arbitrary placing of the custody of the child with a person who will not serve the child's best interests.

Mr. Justice Frankfurther's concurring opinion in *May* v. *Anderson*, 345 U.S. 528 (1953), contained the following language:

> "But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time."

This case related to whether one's State must give full faith and credit to another State's judgment relating to custody of a child.

It appears that the Oklahoma Supreme Court did recognize the importance of a hearing to determine the child's best interests by stating in said order that the Application to Assume Original Jurisdiction, Petition for Wirt of Pro-

hibition and Mandamus is denied without prejudice to Habeas Corpus proceedings in Oklahoma or under Kansas law, and without prejudice to proceedings under Title 10 Oklahoma Statutes, Section 1101, *et seq.*, or the Kansas equivalent thereof, said statute being related to proceedings concerning dependent and delinquent children. (Title 10 O.S., Sections 1101 and 1102, showing Definitions and Jurisdiction, and the equivalent Kansas Statutes, Sections 38-802 and 38-806, are included herein as Appendix "F".)

Habeas Corpus proceedings are available only to the grandmother, and then only, if the petitioners refuse to abide by the orders of the court regarding the surrender of the custody of the child, and the juvenile proceedings would be available to the petitioners only after the child is delivered to the grandmother. Therefore, the petitioners do not have either route available to them.

The order of the Oklahoma Supreme Court denies the petitioners' rights under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the order and judgment of the Supreme Court of Oklahoma.

Respectfully submitted,

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Counsel for Petitioners

July, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of July, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Albert W. Murry, 3801 Classen, Suite 200, Oklahoma City, Oklahoma 73118, attorney for the respondent.

I further certify that all parties required to be served have been served.

Paul McKinney
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Attorney for Petitioners

APPENDICES

APPENDIX A

[Filed June 10 1980]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

KITTY LOUISE STROUSE, and ROBERT D. WINTER, Petitioners,	)	
vs.	)	No. 53,876
GLEN DALE CARTER, Associate District Judge of the District Court of Pottawatomie County, Oklahoma, Respondent.	)	

ORDER

Petitioner's Application to Assume Original Jurisdiction, Petition for Writ of Prohibition and Mandamus is DENIED without prejudice to 12 O.S. 1971, § 1754 habeas corpus proceeding in Oklahoma, or under Kansas law; and further, without prejudice to proceedings under 10 O.S. Supp. 1979, § 1101, et seq., or the Kansas equivalent of the cited provisions of Title 10.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 5th day of May, 1980; however this Order shall not become effective nor filed until the end of the Spring, 1980, school term.

(s) *Pat Irwin*
Acting Chief Justice

APPENDIX B

[Filed June 27, 1979]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

KITTY LOUISE STROUSE and ROBERT D. WINTER, Petitioners,	)	
-vs-	)	No. 53,876
GLEN DALE CARTER, Associate District Judge of the District Court of Pottawatomie County, Oklahoma,	)	

PETITION FOR WRIT OF PROHIBITION,
AND IN THE ALTERNATIVE,
WRIT OF MANDAMUS

Come now the petitioners, Kitty Louise Strouse and Robert D. Winter, and respectfully show the Court, as follows:

1. That the petitioner, Kitty Louise Strouse, is a resident of the State of Kansas, having formerly been a resident of the State of Minnesota until approximately four months ago; that the petitioner, Robert D. Winter, is a resident of Oklahoma County, Oklahoma; and, that the respondent, Bette J. Winter, is a resident of Pottawatomie County, State of Oklahoma.

2. That on the 4th day of June, 1976, the District Court of Pottawatomie County, Oklahoma, entered its judgment vacating and setting aside a decree of adoption, wherein the petitioner, Robert D. Winter, and the respondent, Bette J. Winter, natural parents of the petitioner, Kitty Louise Strouse, became the adoptive parents of Lori Gay Winter the natural child of the petitioner Kitty Louise Strouse; that the judgment of the District Court of Pottawatomie County, Oklahoma, was based upon the

finding that the respondent, Bette J. Winter, procured the consent to adoption of Lori Gay Winter by fraud; that the respondent herein perfected her appeal to this Honorable Court, and on the 24th day of October, 1978, this Court, in a five to four decision, reversed the District Court of Pottawatomie County, Oklahoma, on the ground that the one year statute of limitation contained in 10 O.S. 1971, §58, is controlling in vacating or setting aside a decree of adoption based upon fraud, rather than either of the two year statutes of limitation found in 12 O.S. 1971, §1038, or 12 O.S. 1971, §95 (third); that this Honorable Court merely reversed and remanded said case without instructions.

3. That thereafter the petitioners herein filed their Petition for Writ of Certiorari in the United States Supreme Court, which petition was ultimately denied.

4. That subsequent to the issuance of the mandate by this Honorable Court, the respondent herein filed in the District Court of Pottawatomie County, Oklahoma, her "Application for Post Appeal Relief", which prayed for an order directing the petitioners to return the minor child, Lori Gay Winter, to the respondent in Shawnee, Pottawatomie County, Oklahoma; that said application was filed on the 8th day of March, 1979; that on the 14th day of March, 1979, the District Court of Pottawatomie County, Oklahoma, sustained the petitioners' motion to dismiss said application on the ground that it has no jurisdiction of the subject matter or the parties; that on said date, the court also ordered that the mandate of the Supreme Court of the State of Oklahoma be spread of record, and that judgment be rendered accordingly; that thereafter, on or about the 16th day of May, 1979, the respondent filed in the District Court of Pottawatomie County, Oklahoma, a "Motion to Return Minor Child"; wherein the respondent prayed the court for an order directing the return of the minor child, Lori Gay Winter, to the said Bette J. Winter; that the petitioners herein filed their response to said Motion to Return Minor Child, pleading res judicata in that the court had

already considered the same matter, wherein the same parties were involved, on the 14th day of March, 1979, and had found it had no jurisdiction; that the order and judgment entered by the District Court of Pottawatomie County, Oklahoma, was not appealed, and was a final judgment; that the petitioners further responded by pleading that the District Court of Pottawatomie County, Oklahoma, has no jurisdiction of the parties or subject matter; that the petitioners further alleged that in any proceeding to determine custody of the minor child, Lori Gay Winter, her best interests are of primary concern, and to summarily order her custody transferred without a hearing on the matter of best interests would be a violation of her constitutional rights, as well as the constitutional rights of the petitioners herein, in that it would be a denial of equal protection of the laws, and denial of due process. The petitioners also filed their motion for judgment on the pleadings.

5. That on the 5th day of June, 1979, the District Court of Pottawatomie County, Oklahoma, overruled the petitioners' defense of res judicata, and ordered briefs to be filed on the question: "Is there a continuing jurisdiction in the trial court to enforce the final appellant (*sic*) order entered in the cause in an adoption proceeding to the extent of and including ordering the transfer of the child?"; and ordered that the Motion for Judgment on the Pleadings filed by the petitioners herein, and the Motion to Return the Minor Child filed by the respondent herein, would be heard on the 19th day of June, 1979.

6. That on the 19th day of June, 1979, the court heard argument of counsel with regard to the question of jurisdiction, and entered its order finding that neither the matter of best interests of the child, Lori Gay Winter, nor the matter of substantial, material and permanent change considerations applies in this case, and that the question is whether or not the District Court of Pottawatomie County, Oklahoma, has the residual jurisdiction to, in effect, "force"

the judgment of the Supreme Court entered in this cause; that a certified copy of the Journal Entry of Judgment entered on the 19th day of June, 1979, is hereto attached, marked Exhibit A, and made a part hereof.

7. The petitioners respectfully show this Honorable Court that the District Court of Pottawatomie County, Oklahoma, had no power or jurisdiction to enter said order and judgment directing the surrender of said child to her grandmother, the adoptive mother, and unless prohibited by this Honorable Court the District Court of Pottawatomie County will proceed to enforce such order and judgment.

8. In the alternative, your petitioners herein respectfully show this Honorable Court that in the event a writ of prohibition prohibiting the enforcement of said order and judgment is not granted by this Honorable Court, a writ of mandamus should be allowed by this Court, requiring the District Court of Pottawatomie County, Oklahoma, to conduct a hearing on the matter of best interests of said Lori Gay Winter before entering any orders relating to the transfer of said child, or her custody; that for more than three years the said Lori Gay Winter, who is now eleven years old, has been living with her natural mother, Kitty Louise Strouse, and her husband and two other children, in a stable, happy family environment, and to summarily order the transfer of the custody of said child to her divorced grandmother, the adoptive mother, without consideration of her best interests, would be a denial of the constitutional rights of the child, Lori Gay Winter, and the petitioners herein, and that it would violate her rights as to the equal protection of the laws and due process.

9. The petitioners herein further request this Honorable Court to stay the order and judgment of the District Court of Pottawatomie County, Oklahoma, entered on the 19th day of June, 1979, with regard to ordering the surrender of the child, Lori Gay Winter, on or before the 6th day of July, 1979, until this Honorable Court determines

whether said writ of prohibition, or in the alternative said writ of mandamus, will be allowed as prayed for by the petitioners.

WHEREFORE, premises considered, the petitioners herein pray that this Honorable Court issue its writ of prohibition directed to the said Glen Dale Carter, Associate District Judge of Pottawatomie County, Oklahoma, the respondent herein, commanding him to desist and refrain from further proceedings in said case, No. JFA-71-29, in his capacity as Associate District Judge of said court in and for Pottawatomie County, Oklahoma, and to desist and refrain in said capacity from exercising further jurisdiction over the persons and the subject matter of your petitioners and the said Lori Gay Winter, and from enforcing the order and judgment of the said court entered on the 19th day of June, 1979. In the alternative, your petitioners respectfully pray that a preemptory writ of mandamus be allowed by this Court, requiring said respondent to conduct a hearing on the merits of the best interests of the child, Lori Gay Winter, before entering or enforcing any orders relating to the transfer of custody of the child, Lori Gay Winter, and for an order staying said order of the District Court of Pottawatomie County, Oklahoma, entered on the 19th day of June, 1979, and for such other and further relief this Court deems just and proper.

(s) Paul McKinney
Attorney for Petitioners

[Certified]

[APPENDIX]

EXHIBIT A

[Filed June 26, 1979]

IN THE DISTRICT COURT OF THE
TWENTY-THIRD JUDICIAL DISTRICT,
POTTAWATOMIE COUNTY, OKLAHOMA

In the Matter of the Adoption of	)	
	)	JFA-71-29
LORI GAY WINTER	)	

JOURNAL ENTRY OF JUDGMENT

Now, on this 19th day of June, 1979, the above styled and numbered cause came on to be heard pursuant to a Motion to Return Minor Child filed by the respondent, Bette J. Winter. The respondent appeared in person and by her attorney, Albert W. Murry and the petitioners, Kitty Louise Strouse and Robert D. Winter appeared by their attorney, Paul McKinney.

The court heard argument of counsel concerning the question of whether this Court has continuing jurisdiction of the parties and the subject matter with regard to entering an order directing the Petitioner, Kitty Louise Strouse, to return the minor child, Lori Gay Winter to the respondent, Bette J. Winter, after the Supreme Court of the State of Oklahoma reversed this Court's judgment setting aside the decree of adoption of Lori Gay Winter based upon the consent to adoption being procured by fraud perpetrated by the respondent, Bette J. Winter and remanding same.

After hearing such argument and after considering the briefs submitted by counsel, the Court FINDS:

That the matter of best interests of the child, Lori Gay Winter, or the matter of substantial, material and permanent change considerations does not apply in this case, and that the question is whether this Court has the residual

jurisdiction to, in effect, force the judgment the Supreme Court entered in this cause.

That this Court has jurisdiction of the parties and the subject matter to order the return of the child, Lori Gay Winter, by her natural mother, a resident of the State of Kansas, with whom the child has been living for the last three years, to her grandmother, the adoptive mother, Bette J. Winter, in Shawnee, Pottawatomie County, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioner, Kitty Louise Strouse, is hereby ordered to surrender the child, Lori Gay Winter, to the adoptive mother, Bette J. Winter, on or before the 6th day of July, 1979, in Shawnee, Oklahoma, or in the alternative to the Court.

Each of the parties is granted exceptions to any and all adverse rulings herein.

(s) *Glenn Dale Carter*
JUDGE OF THE DISTRICT COURT

[Approved as to form by both counsel]

[Certified a true copy]

APPENDIX C

[Filed June 4, 1976]

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY, OKLAHOMA

JUVENILE AND FAMILY RELATIONS DIVISION

IN THE MATTER OF THE ADOPTION OF LORI GAY WINTER	)))	No. JFA-71-29

RULING

The Petitioner, the natural mother of the captioned child, filed a petition to set aside a decree of adoption alleging that her purported consent was procured by fraud, duress, intimidation and coercion. The child was born on the 22nd day of July, 1968, to the unwed 17-year-old daughter of the adoptive parents. Petitioner's evidence tends to establish that after two and one half years of endeavoring unsuccessfully to prevail upon her to consent to the adoption of her child, the adoptive parents represented to her that at such time as she had married a man of whom they approved, they would return custody of, and relinquish their rights to the child to the natural mother and her suitable husband. The Respondent Adoptive Mother denies any such representation and further alleges that the one year Statute for contesting the adoption (10 O.S. 58) precludes Petitioners from obtaining relief. The Oklahoma court has adjudicated that an adoption decree obtained by fraud or undue influence could be set aside. *Laffon* vs. *Hayden*, 337 P2d 736 (1959).

The Court determined in *Graves* vs. *Graves*, 481 P2d 136 (1971) that the enactment of the Uniform Adoption Act did not completely rule " . . . out fraud in procuring consent to an adoption . . ." and that the provisions of 12 O.S. 95 Subd. Sixth which provides ". . . an action or proceeding which seeks to vacate, cancel or otherwise at-

tack or to avoid a decree of adoption, directly or collaterally, except in the case of extrinsic fraud shall be brought within one (1) year from the date of entry of decree . . ." survived the enactment of the Uniform Adoption Act. Subsequent to the *Graves case* the legislature repealed the foregoing 95 O.S. 12 Subd. Sixth. The legislature did not however, repeal nor otherwise exclude application to adoption proceedings of 12 O.S. 95 Subd. Third which provides a two (2) year statute of limitation for an action for relief on the ground of fraud. The Court concludes that the repeal of Subd. Sixth, which by its very language, did not obtain in proceedings seeking to vacate, cancel or otherwise attack or void a decree of adoption predicated on extensive fraud, did not preclude attacks predicated on fraud provided for in Subd. Third which had, prior to the repeal of Subd. Sixth, been recognized in *Laffoon* vs. *Hayden* supra. The legislature enacted 10 O.S. 1103(c) in 1968 limiting to three months direct and collateral attacks on the termination of parental rights in instances where an adoption had been accomplished regardless of whether the order was void or voidable. It should be noted that the instant cause involves a purported consent to adoption and not termination of parental rights by the Juvenile Court. The legislature, after *Graves* vs. *Graves,* supra, passed 10 O.S. 58 limiting direct and collateral attacks upon an adoption to one year after the entry of a final decree regardless of whether the decree is void or voidable, in 1971. This act became effective the same day that the repeal of 12 O.S. 95 Subd. Sixth became effective. In *Graves* vs. *Graves* supra, the court discussed at page 138(3) that there was a common law right to all persons to have the revocation of an adoption decree in instances of fraud. The court held that "to strike down a valuable right existing by common law, merely upon an inference to be drawn from a new statute, presents an unhappy manner of adjudicating those rights and holding that they no longer exist." Citing a line of authority, the Court approved the rule "that . . . statutes in derogation of common law rights are to be strictly con-

strued . . .". This court, therefore, concludes that the common law remedy predicated on fraud has survived the adoption of 10 O.S. 58 (and although not before the court, likewise, 10 O.S. 1103(c)) and further, that application of the above sections are limited to void and voidable decrees and orders other than those obtained through fraud.

The court, having concluded that the fundamental and basic common law remedy of fraud continues to be a viable basis for seeking relief, now considers what constitutes fraud in an adoption context.

Fraud as applied in adoption proceedings has been accorded an expanded definition from common law contract and tort application. In *Arnold* vs. *Howell* 219 P2d 854 (1950), a California case, the court at page 859(11) cited with approval a statement from an earlier California case, *Wells* vs. *Zenz*, 256 Pac 484 the following rule: "No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling and unfair ways by which another is deceived . . ." A comprehensive definition of common law fraud is found in the Oklahoma case of *Armstrong* vs. *Wasson* 220 Pac 643 which is cited with approval in *Arnold* vs. *Howell* supra. The allegations in *Arnold* vs. *Howell* were that the ". . . consent was obtained through the representation of the adopters and the maternal grandmother acting for them, that the adoption was necessary to protect the child and was only a temporary measure, the child to be returned to him after his overseas service. The latter representation was made without intent to carry it out."

In *Graves* vs. *Graves* supra, also an instance of grandparents adopting the child, as herein, the Court has utilized the definition of fraud from *Hildebrand* v. *Harrison* 361 P2d 498 and in doing so, the Court said: "There is also the matter of the detestable nature of 'fraud' in that it embraces all of the multifarious means which human

ingenuity can devise and are resorted to by one individual to get an advantage over another."

In Re Adoption of Hoffman 338 N.E.2d 862 (1975) at page 867 the Court provided the following definition of fraud: "As a general proposition, 'Fraud includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence * * *.' (*People ex rel. Chicago Bar Association* v. *Gilmore* (1931), 345 Ill. 28, 46; 177 N.E. 710, 717.) "The concept of fraud 'implies a wrongful intent — an act calculated to deceive.' " (*Exline* vs. *Weldon* (1974), 57 Ill. 2d 105, 110; 311 N.E. 2d 102, 105). We have also observed that "A misrepresentation in order to constitute a fraud must consist of a statement of material fact, false and known to be so by the party making it, made to induce the other party to act, and, in acting, the other party must rely on the truth of the statement." *Roth* vs. *Roth* (1970), 45 Ill.2d 19, 23; 256 N.E.2d 838, 840.

The Petitioner, her present husband and the adoptive father all testified unequivocally that there was "agreement" that the child was to be returned to the natural mother. And these witnesses further testify as to conversations with the adoptive mother in which this "agreement" was discussed. The natural mother denies the "agreement" and any and all conversations in which such an "agreement" was discussed.

The Court finds that the credible evidence shows clearly and convincingly, the existence of such representations, and while such an "agreement" is unenforcible and void as against public policy, the existence of such representations is relevant to evidence the intent to operate a fraud upon the Petitioner.

The Court now considers what type of representations and acts constitute fraud. In *Arnold* vs. *Howell et al* 219

P2d 854 (1950) the allegations were that the maternal grandmother acting in concert with the adopters, represented to the natural parents, that the adoption ". . . was only a temporary measure, the child to be returned . . ." after the father returned from overseas military service. In *Laffon* vs. *Hayden,* 337 P2d 736, the adoptive parties allegedly represented ". . .that they would take an adoption decree only for convenience of protecting plaintiffs against each other; that the plaintiffs could continue to enjoy the children and treat them as their own . . ." (page 738). In *In Re Adoption of Hoffman* 338 N.E.2d 862, "the natural parents theory of fraud in this case is that the grandparents misrepresented the purpose and necessity for the adoption and led them to conclude that they could retain physical custody of the child notwithstanding the adoption."

In the instant case the Court finds that the efforts to prevail on the mother to first adopt the child out began prior to the birth of the child, and persisted for approximately two and one-half years until the mother finally consented on the consideration that upon her marriage to a man of whom her parents approved, the child would be restored to her. The evidence shows that approximately three (3) weeks after the marriage of the natural mother to her present husband, the Petitioner and her husband sought for the first of many times to obtain the child. They were successively thwarted by the Respondent Adoptive Mother's delaying the return until the Petitioner's economic condition improved, until the present husband had completed his course at Okmulgee Tech, until the child's school term ended, etc., but throughout this period of request for return of custody by the Petitioner, and the refusal of such request, the Respondent Adoptive Mother never denied the "agreement" nor did she indicate her intention not to honor the same but sought to delay returning the child until some event occurred or condition improved.

The Respondent Adoptive Mother asserts that even if there was fraud practiced upon the Petitioner, she knew or should have known and could have through the exercise of due dilegence discovered the fraud in excess of two (2) years before the commencement of the present proceedings. The uncontroverted evidence established that the Petitioner was admitted to the hospital in July, 1974, after an overdose of medication. The Petitioner testified that this occurred immediately following the Respondent Adoptive Mother's refusal to restore custody at the end of the school year, and the revelation by the Respondent Adoptive Mother for the first time that she did not intend to return the child to the natural mother ever. The Respondent Adoptive Mother's pastor and witness testified to his visiting the Petitioner during this overdose episode and that he understood the event to have been the result of a confrontation between the Petitioner and Respondent Adoptive Mother concerning custody of the child.

The Court finds that each delay in returning the child was predicated upon a reassurance by the Respondent Adoptive Mother of the "agreement" to return the child to its natural mother, and that each delay was further predicated on logical and rational bases which would terminate upon the passage of a brief interim. The Court concludes that the Petitioner was not aware and could not have become aware, through the exercise of due diligence, of the fraud practiced upon her until July, 1974.

The Court finds that the Petitioner's unrealized expectations that her natural child would be returned to her, was a direct result of the misrepresentations of the Respondent Adoptive Mother.

The Oklahoma court in *Graves* vs. *Graves*, 481 P2d 136 at page 138 quoted with approval the general rule from *Conville* vs. *Bakke* 400 P2d 179 ". . . that the adoption statute is strictly construed in favor of rights of natural parents when the controversy is between the natural par-

ents and persons seeking to destroy their parental status . . ." It should be noted that *Graves* vs. *Graves* supra was likewise a proceedng to set aside an adoption of a child by the grandparents on the ground of fraud.

The Courts recognize that consideration should be given to the relationship of the parties and the general rule set out in *McGann* v. *McGann,* 37 P2d 939 wherein the Court held that "transaction whereby parent gains advantage over immature child or whereby mature child gains advantage over aged and infirm parent will be scrutinized closely by equity court, where transaction is attaked for alleged undue influence." In the instant case, we have a 17-year-old daughter residing in the home, unmarried, totally dependent upon her parents for support, who is subjected to psychological domination of her mother and who finally submits conditonally to the adoption of child after resisting for two and one-half years. When the daughter, three (3) weeks after her marriage, attempted in January or early February, 1972, to regain custody of her child, the adoptive parents finalized the decree shortly thereafter on February 28, 1972.

Graves vs. *Graves* supra held that ". . . the welfare of the child is not to be ignored in considering the validity of the adoption proceedings . . ."; and the best interest test was likewise applied by the Court of Appeals in *In the Matter of the Adoption of Morrison, a Minor Child,* 47 OBAJ 1280 (May 25, 1976).

In applying the best interest test, this Court finds that the present adoptive parents are divorced and that custody of the minor child has been placed in the adoptive mother. The Court further finds that there has been difficulty experienced in the adoptive father's exercising his right of reasonable visitation with the minor child. The Court further finds that the natural mother is married, in a stable home which has not been subjected to the trauma of voluntary separations or petition for divorce or separate mainte-

nance, that there has been born of the marriage of the natural mother and her first and only husband, one child, and that another child is expected of the marriage. The Court finds that the natural mother's husband is a Sergeant in the United States Armed Forces and is contemplating a military career. The Court finds that the mother and her present husband enjoy a stable marital relationship. The Court further finds that the minor child is, and has been throughout her life, aware of the natural relationship of the parties.

The Court finds that the uncontroverted evidence is that the adoptive father overheard a conversation in which the minor child expressed the wish that her adoptive mother were dead in order that she, the child, could live with her natural mother and the natural mother's husband. The Court further finds that on an occasion where the natural mother visited at the child's school for a lunch period, that an effort to extend the period of time for visitation was denied by school authorities and that the minor child became very anxious and agitated at the termination of the visit with her natural mother.

The Court further finds that the adoptive mother is 45 years of age and that there are no other children in the home. The Court concludes that when the child reaches her eighteenth birthday in July of 1986, that the adoptive mother will be 55 years of age and the natural mother will be age 35. The Court further finds that the adoptive mother is maintaining full-time employment and the child is left in the care of an elderly octogenarian grandmother (natural great-grandmother). The Court further finds that the natural mother is a full-time housekeeper and homemaker and resides in an adequate and comfortable home with her husband and child.

The Court therefore finds that the Petitioner has established to the Court's satisfaction by clear and convincing evidence that the instant adoption was procured through

fraud, deceit and material misrepresentation, and the Court further finds that the Respondent Adoptive Mother has not shown by a preponderance of the evidence that the Petitioner knew or could have, through the exercise of due diligence, discovered the existence of such fraud, deceit, and material misrepresentation two (2) years antecedent to the filing of this petition.

The Court therefore finds that the amended petition to set aside the Decree of Adoption as amended, should be and the same hereby is granted and sustained.

The Decree of Adoption heretofore entered on the 28th day of February, 1972, is hereby vacated, set aside, and held for naught, and the Petition for Adoption is accordingly dismissed.

To provide for maintenance of stability and order, the effectiveness of the orders herein as entered is hereby stayed for a period of fifteen (15) days from this date.

Done on this the 4th day of June, 1976.

s/ *Glenn Dale Carter,*
Glenn Dale Carter,
Associate District Judge

[Certified true copy]

APPENDIX D

[Filed Oct. 24, 1978]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

IN THE MATTER OF THE ADOPTION	)	
	)	
OF LORI GAY W.	)	
BETTE J. W.,	)	
Appellant,	)	No. 49807
-vs-	)	
	)	
KITTY LOUISE S. AND	)	
ROBERT D. W.,	)	
Appellees.	)	

* * *

APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE
COUNTY, OKLAHOMA
HONORABLE GLENN DALE CARTER, TRIAL JUDGE

* * *

Appellant, an adoptive parent, appeals from an order of the trial court vacating a decree of adoption on the grounds that the natural mother's consent to the adoption was procured by fraud.

* * *

REVERSED AND REMANDED

* * *

Albert W. Murry,
Arthur L. Dyer, Jr.,
Oklahoma City, Oklahoma, For Appellant,

Paul McKinney,
Joseph E. McKinney,
Shawnee, Oklahoma, For Appellees.

IRWIN, J.

Appellee (Kitty) is the daughter of appellant (Bette) and appellee (Robert), Kitty is the natural mother of a minor girl (Lori) who was adopted by Bette and Robert. The decree of adoption was entered on February 28, 1972. On March 22, 1976, Kitty commenced proceedings to vacate the adoption decree based upon fraud. Kitty admits she discovered the alleged fraud in July, 1974.

The primary issue presented is whether the one (1) year or two (2) year period of limitations was applicable. The trial court determined that the two year period was applicable and rendered judgment vacating the adoption decree based upon a finding that Kitty's action was brought within two years of the discovery of the fraud. Bette appealed. Robert, since divorced from Bette, did not challenge the proceedings to set aside.

Kitty was seventeen years old when Lori was born out of wedlock in July, 1968. Kitty and Lori lived with Bette and Robert for approximately two and one half years following Lori's birth and during that time Bette and Robert exerted considerable pressure upon Kitty to allow them to adopt Lori. Kitty eventually consented so that Lori would have a complete birth certificate, medical and health insurance, and the advantages of a two parent home. Additionally Bette promised that Kitty's parental rights would be restored when Kitty married a man acceptable to Bette and Robert. Kitty consented to the adoption of Lori in November, 1971, with all the necessary court formalities.

After the petition for adoption was filed and before the final decree was entered in February, 1972, Kitty married a husband of whom Bette and Robert approved. Kitty testified she asked for return of Lori right after her marriage and before the final decree of adoption was entered. She further testified for 2 and ½ years after the decree of adoption was entered her efforts to regain Lori were

thwarted by one excuse after another and that Bette would always tell her to wait for a better time. Finally in July 1974, Bette told Kitty that she would never relinquish Lori, and had never intended to do so. This, claims Kitty, is the first time she knew of Bette's fraudulent intention and conduct to keep the child.

The gist of Kitty's petition to vacate the adoption decree was that her consent to adoption was obtained by reason of the fraudulent conduct of Bette and that Bette continued her fraudulent conduct in that she kept promising her that the adoption would be vacated and her parental rights restored as soon as Kitty could properly care for Lori.

Bette contends that the one year limitation period prescribed by 10 O.S. 1971, §58, is applicable and it effectively bars Kitty's action to set aside the adoption decree. Sec. 58, which was enacted in 1971, provides:

> "No adoption may be challenged on any ground either by a direct or collateral attack more than one (1) year after the entry of the final adoption decree regardless of whether the decree is void or voidable and the minority of the natural parent shall not operate to prevent this time limit from running."

Kitty relies upon 12 O.S. 1971, §95 (third) which provides a two year limitation for "An action for relief on the ground of fraud — the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." Kitty argues that since she did not discover until July, 1974, that Bette did not intend and had never intended to let her have Lori, that her action to vacate the adoption decree based upon fraud was timely commenced within the 2 year limitation period.

Prior to the enactment of 10 O.S. 1971, § 58, and the amendment of 12 O.S. 1961, §95 in 1971 (See 1971 Session Laws, Ch. 316, Pgs 800-802) limitations for proceedings to

vacate or set aside decrees of adoption were governed by 12 O.S. 1961, §95(sixth) which provided:

> "An action or proceeding which seeks to vacate, cancel or otherwise attack or to avoid a decree of adoption, directly or collaterally, except in the case of extrinsic fraud shall be brought within one (1) year from the date of the entry of decree; * * * "

The above limitations proviso was deleted by the 1971 amendment to sec. 95, supra, in the same legislative enactment in which sec. 58, supra, was enacted.

Kitty cites *In Re Adoption of Graves*, Okl., 481 P.2d 136 (1971); and *In the Matter of the Adoption of Jones*, Okl.App., 558 P.2d 422 (1976), as holding that our former statute (sec. 95 [sixth]), repealed in 1971, which granted natural parents the right to set aside an adoption decree obtained by fraud, was purely a declaration of the common law. Kitty argues that "fraud remains grounds for revoking a decree of adoption; that the repeal of title 12 O.S. 1961, §95 (sixth), did not remove fraud as grounds for withdrawal of consent, or revocation, nor did the passage of title 10 O.S. 1971 §58 strike down the common law rights of the natural parent to bring an action to set aside a decree of adoption within the period of time prescribed in 12 O.S. 1971, §95 (third), two years on grounds of fraud."

When 12 O.S. 1971, §95, is considered in connection with 12 O.S. 1971, Chapter 16, relating to "Vacation and Modification of Judgments by Trial Court" and in particular 12 O.S. 1971, §1031 and 1038, it is apparent that 12 O.S. 1971, §95 (third) is not applicable in these proceedings or in any other proceedings which are commenced to vacate or set aside a judgment based upon fraud. Sec. 95, supra, relates to limitations of civil actions other than for the recovery of real property, and, generally speaking, relates to an initial action where a litigant seeks to obtain a judgment. After the deletion of the limitation period for attacking adoption proceedings in 1971, sec. 95, contains

no language relating to vacating or otherwise challenging judgments that have already been entered.

On the other hand a proceeding to vacate a final decree of adoption is within the purview of 12 O.S. 1971, §1031 (fourth) which specifically provides for the vacation or modification of judgments or orders "for fraud practiced by the successful party in obtaining the judgment or order." Although 10 O.S. 1971, §58, since its enactment in 1971, is the only limitation statute specifically mentioning adoption decrees, sec. 58 makes no attempt to set forth any grounds upon which a decree of adoption may be challenged or attacked. Sec. 58 is a statute of limitation. Fraud, under sec. 1031 (fourth) remains a viable statutory ground for vacating an adoption decree.

12 O.S. 1971, §1038 is a general statute of limitation applicable to proceedings brought under sec. 1031, supra. It provides that proceedings to vacate or modify judgments or orders based upon fraud "must be commenced within two years after the judgment or order made, * * *." And, where it is alleged that a judgment was procured by fraud, it may be attacked within two years from the date such fraud was discovered or should have been discovered by the exercise of reasonable diligence. *Westbrook* v. *Dierks*, Okl., 292 P.2d 172 (1955). It necessarily follows that the applicable statute of limitations in these proceedings is either 10 O.S. 1971, §58, or 12 O.S. 1971, §1038, and not 12 O.S. 1971, §95 (third). This holding does not alter the primary issue presented, i.e., is the one year limitations of 10 O.S. 1971, §58, controlling in vacating or setting aside an adoption decree based upon fraud?

10 O.S. 1971, §58 states in sweeping terms that "no adoption", whether the subject of a "direct or collateral attack" may be challenged more than one (1) year after the entry of the final decree whether the "decree is void or voidable". By repealing 12 O.S. 1961, §95 (sixth) and enacting 10 O.S. 1971, §58, in the same enactment in 1971,

it is evident the Legislature intended to bar, within *constitutional limitations,*[1] any proceedings attacking a final adoption decree more than one (1) year after the decree is entered. We used the words "within constitutional limitations" because it is elementary that sec. 58, is subject to the constitutional limitations of the United States and Oklahoma Constitutions and must not be interpreted so as to bar proceedings beyond one year period where the question of due process of law is timely presented even though more than one year has expired after the adoption decree was entered. The Supreme Court of the United States in *Armstrong* v. *Manzo,* 380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187, in considering the basic requirements concerning due process in an adoption proceeding reversed and remanded to a Texas court an adoption proceeding on the grounds that the failure to notify the divorced father of the pendency of the proceedings deprived him of due process of law and rendered the decree constitutionally invalid. The Supreme Court of Colorado in *White* v. *David,* Colo. 428 P.2d 909 (1967), interpreted its limitations statutes for challenging adoption decrees in some what the same way we interpreted sec. 58, in order to uphold its constitutionality. The Colorado court said: "This statute * * * clearly serves the beneficial purpose of curing such defects which are technical and do not affect the basic rights of the parties. The statute further serves the purpose of guaranteeing to adopting parents the undisturbed relationship with the child, which was one of the legislative intents."

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[1] Neither in the trial court nor on appeal have appellees challenged the constitutionality of §58, supra, under the State or Federal Constitutions. Where the record clearly shows that the question of the constitutionality of an act of the Legislature was not presented to the trial court, and no reference to the constitutionality of the act of the Legislature in question appears in the record, such question will not be considered on appeal by this Court. *Birmingham Fire Insurance Company* v. *Bond,* Okl., 301 P.2d 361 (1956).

After the 1971 amendment of 12 O.S. 1961, §95, the only statute specifically prescribing a limitation period for challenging adoption decrees is 10 O.S. 1971, §58, which is part of our adoption statutes. If the one year period of limitations prescribed by sec. 58, is not applicable to proceedings to vacate an adoption decree based upon fraud, it necessarily follows that the two year period prescribed by sec. 1038 is controlling. A fortiori, if sec. 1038 is controlling in proceedings based upon fraud, the two year period would also be controlling in a proceeding to vacate an adoption decree under 12 O.S. 1971, §1031 (seventh). "For unavoidable casualty or misfortune, preventing the party from prosecuting or defending." The Legislature, when it repealed 12 O.S. 1961, §95 (sixth) and enacted 10 O.S. 1971, §58, in the same enactment, did not intend to enlarge the time for challenging final adoption decrees but intended to shorten the time. In *Reubin* v. *Thompson*, Okl., 406 P.2d 263 (1965), we said:

> "A statute which is enacted for the primary purpose of dealing with a particular subject, and which prescribes the terms and conditions of that particular subject matter, prevails over a general statute which does not refer to the particular subject matter, but does contain language which might be broad enough to cover the subject matter if the special statute was not in existence.
>
> Where there are two provisions of the statute, one of which is special and particular and clearly includes the matter in controversy, and where the special statute covering the subject prescribes different rules and procedure from those in the general statute, it will be held that the special statute applies to the subject matter, and that the general statute does not apply."

We hold that the specific statute on limitations for vacating an adoption decree, 10 O.S. 1971, sec. 58, controls over the general statute, 12 O.S. 1971, sec. 1038.

When the adoption decree was entered the trial court had jurisdiction of the parties and the subject matter, and the power to enter the decree. The decree was in no sense void, but merely voidable. Under sec. 58, supra, it would not be subject to attack more than one (1) year after its entry which was in February, 1972, unless some factual circumstance or legal impediment prevented the limitations from running.

As positive as the language of §58, supra, may be, we recognize an exception to its operation which is well illustrated by the present case. There is a general rule, well accepted in this jurisdiction, relating to statutes of limitations which states that if a person induces another to let the limitations period expire, and if such inducement is of such a character as to make it iniquitous to permit the limitations statute to act as a bar, the defendant will be estopped to assert the statute. *Bowman* v. *Oklahoma Natural Gas Company,* Okl., 385 P.2d 440 (1963); *Douglas* v. *Douglas,* 199 Okl. 519, 188 P.2d 221 (1947). The *Douglas* case, for example, involved a confidential relationship existing between a father and son wherein the son exerted his influence over the father to secure his forebearance in seeking recovery on a note and mortgage on which the son was indebted. In *Douglas,* supra, the Court said:

> "* * * In order to estop a person from pleading the statute of limitations it is not necessary for such person to agree not to urge it, but it is sufficient if his conduct or promises are such as are naturally calculated to and do induce plaintiff into a belief that his claim would be adjusted if he did not sue."

The Delaware Supreme Court in *Lieberman* v. *First National Bank.,* Del., 45 A. 901, in considering whether the fraudulent concealment of the existence of a cause of action would hinder the operation of the statute of limitations until discovery said:

> "* * * if one by fraud conceals the fact of a right of action, it is not ingrafting an exception on the statute to say that he is not protected thereby, but it is simply saying that he never was within the statute since its protection was never designed for such as he. By fraud, he has put himself outside of its pale. Whether this be taken as an exception, or only a limitation of the statute, it rests upon sound reason and just policy."

In the case at bar Kitty admits that in July, 1974, Bette told her that she would not release Lori and the trial court concluded that Kitty "was not aware and could not have become aware, through the exercise of due diligence, of the fraud practiced upon her until July, 1974." We conclude that Kitty became aware of Bette's fraudulent conduct in July, 1974. It would be iniquitous to permit the statute of limitation to run in favor of Bette prior to July, 1974, because 10 O.S. 1971, §58, was not designed to protect such fraudulent conduct. However, the one-year limitations period prescribed by sec. 58, did commence to run in July, 1974, and Kitty failed to commence her proceedings to vacate within one year thereafter. At the time Kitty commenced the vacation proceedings in March, 1976, such proceedings were barred by the one-year limitations prescribed by 10 O.S. 1971, §58. The trial court erroneously held that a two year limitations period is applicable in proceedings to vacate a final adoption decree based upon fraud.

Judgment for costs granted appellant.

REVERSED AND REMANDED.

HODGES, C.J.; LAVENDER, V.C.J.; BERRY, HARGRAVE, JJ. concur.

WILLIAMS, BARNES, SIMMS, DOOLIN, JJ, dissent.

DOOLIN, J., DISSENTING:

The United States Supreme Court in *Stanley* v. *Illinois* 465 U.S. 645, 650, 31 L.Ed.2d 551, 558, 92 S.Ct. 1208, 1212 (1972) stated: "The rights to conceive and to raise one's children have been deemed essential, basic civil rights of man and rights far more precious than property rights." 10 O.S. 1971 § 58 should not be used to support a policy that flies in the face of this positive mandate.

In this case the trial court, who took Kitty's appearance and consent to adoption, specifically found the evidence was clear and convincing that the adoption was procured through fraud, deceit and misrepresentation, and without the jurisdictional prerequisite of a valid consent. The court also found the best interests of Lori would be served by returning her to Kitty and her husband. It concluded the common law remedy predicated on fraud survived the enactment of § 58 which should be limited to void and voidable decrees *other than those obtained through fraud.*

The decision of the trial court is in line with the reasoning of this court expressed in *In re Adoption of Graves,* 481 P.2d 136 (Okla. 1971) and *Adoption of Robin,* 571 P.2d 850 (Okla. 1977), where we held adoption statutes must be strictly construed in favor of the rights of natural parents and that the welfare of the child is not to be ignored. In the *Graves* case the natural mother was attempting to withdraw her consent to the adoption of her child on the grounds it was procured by fraud. This court permitted the consent to be withdrawn in the face of 10 O.S. 1961 § 60.10 which reads: "The entry of the interlocutory or final decree of adoption renders any consent irrecovable." We held 12 O.S. 1961 §95(6), then in force, gav a trial court jurisdiction to allow consent to be withdrawn on the basis of fraud even after the final decree had been issued. Although 12 O.S. 1961 §95, subd. 6, was repealed in 1971, eliminating the specific statute of limitations for vacation of an adop-

tion decree on grounds other than extrinsic fraud, the *common law action for fraud should be available to natural parents for setting aside an adoption after entry of a final decree.* Similarly § 58, like § 60.10, must not be considered to have limited this remedy.

A statute should be given a sensible construction, bearing in mind the evils intended to be avoided.[1] The primary object of statutory construction is to ascertain legislative intent.[2] The obvious intent of the Oklahoma Legislature in adopting the one year limitation of § 58 was to protect innocent adoptive parents. As recognized by the majority, this section certainly serves the purpose of curing technical defects that do not affect the basic rights of the parties and guaranties to adopting parents an undisturbed relationship. It is a desirable piece of legislation designed to assure adoptive parents that an unknown natural parent cannot come forward to "change his mind." It was not designed with the intent to protect adoptive parents who act out a clear course of fraudulent behavior in intimidation and coercion and outright lies such as practiced by Bette in this case.

Here we are not concerned with the rights of "innocent" adoptive parents. Bette is not a blameless third person who, in good faith and with honesty, adopted a child. Bette not only defrauded her daughter Kitty, she lied and misled the trial court as to the basis of Kitty's consent to the adoption. Because of the fraud she perpetrated, there are no public policy considerations which favor allowing this adoption to stand.[3] There is no circumstance which necessitates Bette's protection under the one year limitation of § 58. To the contrary, public policy would dictate

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[3] Adoption of Robin, 571 P.2d 850, 857 (Okla. 1977).

[1] A.M.F. Tubescope Co. v. Hatchel, 547 P.2d 374 (Okla. 1976).

[2] Midwest City v. Harris, 561 P.2d 1357 (Okla. 1977).

that such grace period be extended if the decree is granted on the basis of fraudulently obtained consent. Where fraud exists, that would authorize a court to vacate an order, and when such fraud is discovered at a time when statutory remedies are unavailable, relief may be had in equity. *Red Eagle* v. *Cannon* 198 Okla. 330, 177 P.2d 841 (1947).

No legal scheme is completely satisfactory in handling revocation of consent to adoption. Therefore it is essential the court apply its discretion wisely and well. Unless a mother has consented freely and understandingly, the court should not separate the child from its natural parent.[4] The trial court acted in its wisdom and within its power in setting aside Lori's adoption.

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.[5] Society does not permit forfeiture of real estate, automobile, contract rights or other property if fraud is involved. Section 58 as applied by the majority transgresses the purpose of its enaction. That purpose is protection of the blameless. It is immaterial whether or not Kitty participated in the deception. Fraud was practiced *on the court* to the detriment of Lori. The trial court found her best interests were served by her return to Kitty. Lori is certainly blameless. Her welfare must not be ignored.[6]

Section 58 as applied by the majority denies a child or his parent a hearing upon the question of whether the child was fraudulently taken from her mother. Proper con-

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[4] See generally "Revocation of Parental Consent in Adoption Proceedings: Recent Developments" 8 Columbia Journal of Law and Social Problems 156, 178 (1972).

[5] Skinner v. Oklahoma 316 U.S. 535, 62 S.Ct. 1110, 86 O.Ed. 653 (1942).

[6] In re Adoption of Graves, 481 P.2d 136 (Okla. 1971).

struction of adoption statutes is such as will promote the welfare of the child.[7] The trial court's interpretation does this. The majority's does not.

12 O.S. 1971 § 1038 allows an action to vacate an order on grounds of fraud to be commenced within two years after the judgment is rendered. Under this statute Kitty's action was timely filed. This limitation should control, not § 58.

I therefore dissent.

I am authorized to state that Justice Williams, Justice Barnes and Justice Simms concur in the views herein expressed.

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[7] See Nevelos v. Railston 335 P.2d 573 (N.Mex. 1959).

APPENDIX E

[Filed June 25, 1979]

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT, POTTAWATOMIE COUNTY, OKLAHOMA

In the Matter of the Adoption of	)	
	)	JFA-71-29
LORI GAY WINTER	)	

JOURNAL ENTRY OF JUDGMENT

Now, on this 19th day of June, 1979, the above styled and numbered cause came on to be heard pursuant to a Motion to Return Minor Child filed by the respondent, Bette J. Winter. The respondent appeared in person and by her attorney, Albert W. Murry and the petitioners, Kitty Louise Strouse and Robert D. Winter appeared by their attorney, Paul McKinney.

The court heard argument of counsel concerning the question of whether this Court has continuing jurisdiction of the parties and the subject matter with regard to entering an order directing the Petitioner, Kitty Louise Strouse, to return the minor child, Lori Gay Winter to the respondent, Bette J. Winter, after the Supreme Court of the State of Oklahoma reversed this Court's judgment setting aside the decree of adoption of Lori Gay Winter based upon the consent to adoption being procured by fraud perpetrated by the respondent, Bette J. Winter and remanding same.

After hearing such argument and after considering the briefs submitted by counsel, the Court FINDS:

That the matter of best interests of the child, Lori Gay Winter, or the matter of substantial, material and permanent change considerations does not apply in this case, and that the question is whether this Court has the residual jurisdiction to, in effect, force the judgment the Supreme Court entered in this cause.

That this Court has jurisdiction of the parties and the subject matter to order the return of the child, Lori Gay Winter, by her natural mother, a resident of the State of Kansas, with whom the child has been living for the last three years, to her grandmother, the adoptive mother, Bette J. Winter, in Shawnee, Pottawatomie County, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioner, Kitty Louise Strouse, is hereby ordered to surrender the child, Lori Gay Winter, to the adoptive mother, Bette J. Winter, on or before the 6th day of July, 1979, in Shawnee, Oklahoma, or in the alternative to the Court.

(s) *Glenn Dale Carter*
JUDGE OF THE DISTRICT COURT

APPENDIX F

TITLE 10 OKLAHOMA STATUES § 1101

§ 1101. *Definitions*

Text as amended by Laws 1979, c. 257, § 1

When used in this act, unless the context otherwise requires:

(a) The term "child" means any person under the age of eighteen (18) years, except any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robberty with a dangerous weapon, rape in the second degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree or non-consensual sodomy.

(b) The term "delinquent child" means:

(1) a child who has violated any federal or state law or municipal ordinance, excepting a traffic statute or traffic ordinance; or, any lawful order of the court made under this act;

(2) a child who has habitually violated laws or traffic laws or traffic ordinances; or

(3) any sixteen- or seventeen-year-old who has been certified for juvenile proceedings by the criminal division of the district court.

(c) The term "child in need of supervision" means a child who:

(1) has repeatedly disobeyed reasonable and lawful commands or directives of his parent, or legal guardian or other custodian;

(2) is willfully and voluntarily absent from his home without the consent of his parent or guardian, or

legal custodian for a substantial length of time or without intent to return; or

(3) being subject to compulsory school attendance, the child is willfully and voluntarily absent from school for fifteen (15) or more days or parts of days within a semester or four (4) or more days or parts of days within a four-week period without a valid excuse, as defined by the local school boards.

(d) The term "deprived child" means a child who is for any reason destitute, homeless or abandoned; or who has not the proper parents' care or guardianship; or whose home, by reason of neglect, cruelty, or depravity on the part of his parents, guardian or other person in whose care it may be, is an unfit place for such child; or who is in need of special care and treatment because of his physical or mental condition, and his parents, guardian or legal custodian is unable or willfully fails to provide it; or being subject to compulsory school attendance, the child is, due to improper parental care and guardianship, absent from school for fifteen (15) days or more days or parts of days within a semester or four (4) or more days or parts of days within a four-week period without a valid excuse, as defined by the local school boards; or whose parent or legal custodian for good cause desires to be relieved of his custody. Provided, however, no child who, in good faith, is being provided with treatment and care by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to be a deprived child under any provision of this act. Where used in this chapter, the phrase "dependent and neglected" shall be deemed to mean "deprived."

(e) The term "Department" means the Department of Public Welfare of the State of Oklahoma which is also known as the Department of Institutions, Social and Rehabilitative Services.

(f) The term "adjudicatory hearing" means a hearing to determine whether the allegations of a petition under Section 1103 of this chapter are supported by the evidence and whether a child should be adjudged to be a ward of the court.

(g) The term "dispositional hearing" means a hearing to determine what order of disposition should be made with respect to a child adjudged to be a ward of the court.

(h) The term "preliminary inquiry" or "intake" means a mandatory, pre-adjudicatory interview of the child and where available his parents, guardian or custodian performed by a duly authorized individual to determine whether a child comes within the purview of this chapter, whether other nonadjudicatory alternatives are available, and whether the filing of a petition is necessary.

TITLE 10 OKLAHOMA STATUTES § 1102

§ 1102. *Jurisdiction of district court—Transfer or consolidation of proceedings*

A. Upon the filing of a petition, the district court shall have jurisdiction of any child who is or is alleged to be delinquent, in need of supervision or deprived, who is found within the county; and of the parent, guardian or legal custodian of said child, regardless of whether the parent, guardian, or legal custodian is found. When jurisdiction shall have been obtained over a child in need of supervision or a deprived child, it may be retained until the child becomes eighteen (18) years of age and when jurisdiction shall have been obtained over a delinquent child, it may be retained until the child becomes nineteen (19) years of age. For the convenience of the parties and in the interest of justice, a proceeding under this chapter may be transferred to the district court in any other county.

B. The district court in which a petition is filed which alleges that a child is delinquent may retain jurisdiction of

the proceeding notwithstanding the fact that the child is subject to the jurisdiction of another district court within the state. Any adjudication and disposition made by the court in which said petition is filed shall control over prior orders in regard to the child. The district court in which a petition is filed which alleges that a child is in need of supervision or is deprived can issue any temporary order or grant any interlocutory relief authorized by this chapter notwithstanding the fact that another district court within the state has jurisdiction of the child or has jurisdiction to determine the custody or support of the child; but the court in which the juvenile petition is filed shall transfer the proceeding to the other court unless the judge of said other court, after consultation with the judge of the court where the juvenile petition is filed, shall either transfer the other action to the court where the juvenile petition is filed or authorize that court to proceed with the juvenile proceeding and to make any necessary orders in regard to the child should he be adjudged to be in need of supervision or deprived. Where the other proceeding is pending in the same judicial district in which the juvenile petition is filed, the chief judge of the judicial district shall determine if the proceedings shall be consolidated and, if consolidated, which judge shall try the issues when the judges to whom the cases have been assigned are unable to agree on the procedure that should be followed.

KANSAS STATUTES 38-802

38-802. *Definitions.* As used in this act, unless the context otherwise indicates:

(a) "Youth residential facility" means any home, foster home or structure which provides twenty-four hour a day care for children and which is licensed pursuant to Article 5 of chapter 65 of the Kansas Statutes Annotated.

(b) "Delinquent child" means a child less than eighteen (18) years of age who does an act, other than one defined in subsection (e), which if done by a person eighteen (18) years of age or over, would make such person liable to be arrested and prosecuted for the commission of a felony as defined by K.S.A. 21-3105.

(c) "Miscreant child" means a child less than eighteen (18) years of age:

(1) Who does an act, other than one defined in subsection (e), which, if done by a person eighteen (18) years of age or over, would make such person liable to be arrested and prosecuted for the commission of a misdemeanor as defined by K.S.A. 21-3105 or the violation of any city ordinance or county resolution; or

(2) who escapes from or runs away from any lawful court ordered placement or placement by the secretary of social and rehabilitation services after a commitment to said secretary pursuant to the juvenile code, but this subsection shall be applicable only to a child who was an alleged or adjudicated delinquent, miscreant or traffic offender at the time of the court's order of placement or commitment.

(d) "Wayward child" means a child less than eighteen (18) years of age:

(1) Whose behavior is injurious to his or her welfare;

(2) who has deserted his or her home without good or sufficient cause;

(3) who is habitually disobedient to the reasonable and lawful commands of his or her parent, guardian or other lawful custodian; or

(4) who does an act, other than one defined in subsection (e), the commission of which by persons under the age of eighteen (18) years, is specifically prohibited

and made unlawful by state law, city ordinance or county resolution.

(e) "Traffic offender" means a child under fourteen (14) years of age who does an act which, if done by a person fourteen (14) years of age or over, would make such person liable to be arrested and prosecuted for the violation of any of the following traffic offenses:

(1) Any statute relating to the regulation of traffic on the roads, highways or streets, or the operation of self-propelled or nonself-propelled vehicles of any kind except K.S.A. 8-262, 8-287, 8-1566, 8-1568 or 21-3405 and K.S.A. 1979 Supp. 8-1567; or

(2) any city ordinance or county resolution which relates to the regulation of traffic on the roads, highways or streets, or the operation of self-propelled or nonself-propelled vehicles of any kind, except when such ordinance or resolution violation would also constitute a violation of K.S.A. 8-262, 8-287, 8-1566, 8-1568 or 21-3405 or K.S.A. 1979 Supp. 8-1567.

(f) "Truant" means a child who, being by law required to attend school, absents himself or herself therefrom to the extent of being a truant under the provisions of K.S.A. 1979 Supp. 72-1113, and any amendments thereto.

(g) "Deprived child" means a child less than eighteen (18) years of age:

(1) Who is without proper parental care or control, subsistence, education as required by law or other care or control necessary for such child's physical, mental or emotional health, and the deprivation is not due solely to the lack of financial means of such child's parents, guardian or other custodian;

(2) who has been placed for care or adoption in violation of law;

(3) who has been abandoned or physically, mentally, emotionallly abused or neglected or sexually abused by his or her parent, guardian or other custodian; or

(4) who is without a parent, guardian or legal custodian.

(h) "Parent" or "parents" when used in relation to a child or children, include guardian, conservator and every person who is by law liable to maintain, care for or support a child.

(i) "Law enforcement officer" means any person who by virtue of his or her office or public employment is vested by law with a duty to maintain public order or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes.

KANSAS STATUTE 38-806

38-806. *Proceedings governed by juvenile code; jurisdiction of district court.* (a) Except as provided in K.S.A. 1978 Supp. 21-3611 and subsection (b) of 38-808, proceedings concerning any child living or found within the county, who appears to be a delinquent, miscreant, wayward or deprived child or a traffic offender or truant, as defined in K.S.A. 1978 Supp. 38-802, shall be governed by the provisions of the Kansas Juvenile Code.

(b) When jurisdiction has been acquired by the district court over the person of a deprived child, it may continue until the child: (1) has attained the age of twenty-one (21) years, except as provided in (2) or (3) of this subsection (b); (2) has been adopted; or (3) has been discharged by the court. Any deprived child over eighteen (18) years of age may either orally or by written motion to the court request that the jurisdiction of the court cease; thereupon, the court shall enter an order discharging the person from any further jurisdiction of the district court.

(c) Except as provided by subsection (b) of K.S.A. 1978 Supp. 38-808, when any person is charged with having committed an act which may cause such person to be adjudicated a delinquent, miscreant or wayward child or a traffic offender or truant, the court shall proceed pursuant to the Kansas juvenile code and the person charged shall continue under the jurisdiction of said court for such act until such person is finally discharged by the court or has reached the age of twenty-one (21) years.

(d) When the district court has ordered treatment of a child in accordance with K.S.A. 1978 Supp. 59-2917 or has ordered referral of a child in accordance with K.S.A. 59-2918, the jurisdiction of the court, with respect to such child's status as a mentally ill person, shall continue until the child is finally discharged pursuant to the act for obtaining treatment of a mentally ill person.

Supreme Court, U. S.
FILED
OCT 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-68

In the Supreme Court of the United States

OCTOBER TERM, 1980

KITTY LOUISE STROUSE and LORI GAY WINTER, by and through her natural mother and next friend, KITTY LOUISE STROUSE,
Petitioners,

VERSUS

GLENN DALE CARTER, Associate Judge of the District Court of Pottawatomie County, Oklahoma,
Respondent.

On Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October, 1980

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On Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondent respectfully moves the Court to deny the Writ of Certiorari to review the judgment and order of the Supreme Court of Oklahoma entered on the 5th day of May, 1980, but not effective or filed until the 10th day of June, 1980, which appears as Appendix "A" to the Petition for Writ of Certiorari. (The true party in interest is Bette Winter.)

JURISDICTION

Petitioners attempt to invoke jurisdiction under 28 U.S.C. § 1257(3). In refusing or granting jurisdiction, the Court should consider Part V of the Rules of the Supreme Court, Rule 19. Rule 19 provides as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

STATUTORY PROVISIONS INVOLVED

Title 12 Oklahoma Statutes § 223, which provides:

> "An executor, administrator, guardian trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way. R.L.1910, § 4683."

STATEMENT OF THE CASE

The Respondent, Bette Winter, specifically denies those allegations contained in the statement of the case presented by Petitioners, wherein they state that Bette Winter is unfit, "to have custody of the child." There has been absolutely no evidence tending to show that Bette Winter is unfit in any manner whatsoever. Bette Winter has not had an opportunity to visit with the minor child over the four (4) years that the child has resided with Kitty Louise Strouse. Absolutely no visitation privileges were extended to her whatsoever.

The statement of the case of Petitioners would lead one to believe that the minor child was legally in the custody of Kitty Louise Strouse when in truth and fact the minor child is now residing with Kitty Louise Strouse in direct violation of a court order of the District Court of Pottawatomie County, Oklahoma (Appendix A attached herein, Transcript of Ruling).

Kitty Louise Strouse has the minor child as the direct result of a ruling of the trial court which was in error. It seems unconscionable that one would acquire some sort of an interest as a "Foster Parent" or otherwise as the result of an erroneous ruling.

The minor child became a named party in this matter only on the Petition for Certiorari to the United States Supreme Court. Up until that time, the minor child had not been named as a party.

This case has previously appeared before the United States Supreme Court, and at that time a Petition for Writ of Certiorari was denied. It was denied under case number 78-1443 on May 14, 1979.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

One of the real parties in interest throughout this matter has been Lori Gay Winter. Title 12 O.S., § 223 provides as follows:

> "An executor, administrator, guardian trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way. R.L.1910, § 4683."

By reason of the foregoing statute, the child has been a party throughout these proceedings, said proceedings having been brought on her behalf. The case of *Stevens* v. *Kelly,* 134 P.2d 56 (Dist. Ct. App. Calif. 1943), construed a similar California Statute, § 369 of the Code of Civil Procedure. Therefore, she has not been denied due process.

Petitioner attempts to convince the Court that Kitty Louise Strouse has become a foster parent. It is submitted that Kitty Louise Strouse has absolutely no standing in this matter whatsoever. The adoption decree entered in the State of Oklahoma is valid and binding and Kitty Louise Strouse has absolutely no interest in the minor child.

Kitty Louise Strouse is further without standing to raise any legal issues in respect to Lori Gay Winter.

To grant certiorari at this time and allow Kitty Louise Strouse to litigate the best interest of Lori Gay Winter would upset adoptions and totally destroy the integrity of any and all adoptions which have occurred. Natural par-

ents could come forth and contend that they are a better fit parent than the adoptive parent and that the best interest of the minor child is always best served with a natural parent. The net effect of granting certiorari in this case would be to destroy many family units or provide for the method with which that family unit can be destroyed.

There are agencies in Oklahoma that utilize foster parents on a temporary basis; sometimes that time period being quite extensive for the care of minor children. To now say that a hearing on best interest must be conducted prior to that agency reacquiring those minor children from a foster parent is akin to adoption by passage of time. This is precisely what Kitty Louise Strouse would now have the Supreme Court of the United States do.

Petitioner would lead the Court to think that she has been denied due process and equal protection by the denial of a hearing on the best interest issue.

None of the cases cited in Petitioners' Petition for Certiorari are applicable to this case in that all the cases cited by Petitioners pertain to divorce or full faith in credit or other matters not related to adoptions. The legal relationships in the cases cited by Petitioners are extremely different from the legal relationships in this particular case. Further, the Oklahoma Statute, 30 OKLA. STAT. § 11, as cited by Petitioners, relates to marriage and divorce, not adoptions. That statute is found in the title of marriages whereas the statutes pertaining to adoptions are found in Title 10.

The changing of the legal relationships of the parties must be recognized when determining whether or not a state permits a child to choose with whom that child shall

live and the same relationship must be considered when applying the due process or equal protection concept. In other words, when one considers the relationship of the parties, it is apparent that no substantial federal question has been raised by Petitioner; that Petitioner has no standing to raise the best interest issue or a federal question.

The Oklahoma Supreme Court's orders are not arbitrary when the relationship of the parties are considered.

There is absolutely no evidence that Kitty Louise Strouse is serving the best interest of the minor child or that Bette Winter would fail to serve the best interest of the minor child; neither of which is a federal question.

CONCLUSION

Kitty Louise Strouse has the minor child as a result of a court ruling later overturned. She should not be allowed to litigate "best interest" based on passage of time gained as a result of a void court order.

When the legal relationships of the parties are considered, neither Kitty Louise Strouse nor Lori Gay Winter have been denied equal protection or due process.

The Writ should be denied.

Respectfully submitted,

ALBERT W. MURRY
3801 Classen Blvd., Suite 200
Oklahoma City, Oklahoma 73118
Tel. (405) 528-3132

Counsel of Record for Respondent

October, 1980

CERTIFICATE OF SERVICE

I certify that on this ..... day of October, 1980, three (3) copies of the Brief in Opposition to the Writ of Certiorari were mailed postage fully prepaid, to Paul McKinney, 9 East 9th, Shawnee, Oklahoma 74801 and Harold E. Flaigle, 936 N. Waco, Wichita, Kansas, co-counsel for Petitioners.

I further certify that all parties required to be served have been served.

Albert W. Murry

APPENDIX A

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY STATE OF OKLAHOMA

In the Matter of the Adoption)
) No. JFA-71-29
of LORI GAY WINTER.)

— — — — — — — — —

TRANSCRIPT
of

Proceedings had in the above entitled and numbered cause on the 11th day of September, 1980, in District Courtroom No. 2 of the Pottawatomie County Courthouse, Shawnee, Oklahoma.

— — — — — — — — —

BEFORE: THE HONORABLE GLENN DALE CARTER
Associate District Judge

FOR
BETTE J. WINTER: ALBERT W. MURRY
Attorney at Law
3801 Classen, Suite 200
Oklahoma City, Oklahoma 73118

FOR
KITTY LOUISE STROUSE
AND
ROBERT D. WINTER: PAUL McKINNEY
Attorney at Law
9 East 9th Street
Shawnee, Oklahoma 74801

* * * *

THE COURT: In JFA-71-29, you may show the Movant appears in person —

MR. MURRY: Yes, Your Honor.

THE COURT: — and by Al Murry.
And the Respondent —

MR. McKINNEY: Kitty Louise Strouse by Paul McKinney.

THE COURT: Okay. Now, this was the time that she was to have delivered the child —

MR. McKINNEY: Yes, sir.

THE COURT: — over. Okay. Is the child here?

MR. McKINNEY: If the Court please, I have an announcement to make. I received a telephone call this morning from Mr. Harold Fleggal, an attorney in Wichita, Kansas, who is Mrs. Strouse's attorney in Kansas. He asked me to make the announcement to the Court that upon advice of counsel Kitty Louise Strouse respectively declines to deliver Lori Gay Winter.

THE COURT: Okay. Well, of course, you're the attorney in the case here, as far as I'm concerned.

MR. McKINNEY: That's right.

THE COURT: We'll not be relying on advice of somebody in Kansas somewhere. All right. She — she has declined, so that means that you're entitled to bring your contempt proceeding and your motion to —

MR. MURRY: Move first to forfeit the bond. Order payment forthwith. Secondly, we'd ask the Court to issue a citation, set a date certain for hearing, and we'll prepare the pleadings.

THE COURT: Okay. You file your application for citation, and I'll certainly set it for hearing. I don't think there's any question you're entitled to be heard on that. And you file your application for an order directing her — an order ot forfeit the bond and for payment to be made, and I'll entertain that.

MR. MURRY: Okay. In other words, you won't do it today.

THE COURT: No.

MR. MURRY: What I wanted to do today, Your Honor, if we could, just pick a date for my citation to be heard.

THE COURT: Okay. All right. And your motion, also.

MR. MURRY: Yes, Your Honor. That will be fine.

THE COURT: Okay. One o'clock on September the 30th. One o'clock p.m.

MR. McKINNEY: I presume we will be served with copies of applications and orders?

THE COURT: Yes, sir. Do you want to acknowledge receipt — I mean, do you want to acknowledge — or to accept service on behalf of your client now?

MR. McKINNEY: No, Your Honor.

MR. MURRY: And, Your Honor, at this time we would ask Counsel to furnish us with an address in the State of Kansas of which his client resides.

THE COURT: Well, this may be a matter over which there's sufficient continuing jurisdiction of the Court that service on counsel — it wouldn't on contempt. That would require —

All right. Are you prepared to provide that?

MR. McKINNEY: I don't have it with me, Your Honor.

THE COURT: All right. You know —

MR. McKINNEY: I don't mind furnishing the address.

THE COURT: Okay. Can you provide it within twenty-four hours?

MR. McKINNEY: Yes.

MR. MURRY: Would the Court order him to accept service?

THE COURT: I don't think — No, I don't think I can on — I know I can't on contempt.

MR. MURRY: All right, Your Honor.

THE COURT: It's just like accepting him — ordering him to accept service of a warrant. Not many lawyers want to go to jail on behalf of their client.

MR. MURRY: Right. Don't blame them for that, Your Honor.

THE COURT: The — but I am ordering that within twenty-four hours — or I'm simply picking up on his agreement, to provide you the address within twenty-four hours.

MR. MURRY: At this time we'd like to advise the Court that in four years my client has not disobeyed any order out of this Court. We have timely and properly complied with each and every order issued by the Court, by the Supreme Court of the State of Oklahoma on numerous occasions and those orders, if any, out of the United States Supreme Court. And we want that in the record that we have done that.

THE COURT: Well, I understand — I understand your view. I think the thing that's before us is that she has declined to appear. You've been granted leave, and I have fixed a tentative date for the hearing of your motion and your contempt citation.

MR. MURRY: Yes, Your Honor.

THE COURT: I have directed that — And I assume that's to be a telephone call to your office to advise you of the address of the Petitioners, Lori Gay Winter, in the original proceeding.

MR. McKINNEY: And if you'll call me before you leave town, I'll give it to you over the telephone today.

THE COURT: Okay.

MR. MURRY: At this time we'd like to order a transcript of the proceedings which have transpired here today.

THE COURT: All right. That's really between you and the reporter.

MR. MURRY: I understand. Just put it in the record and it's there, Your Honor.

THE COURT: All right. Okay. Anything further before I recess this matter?

MR. MURRY: No, Your Honor.

THE COURT: All right.

MR. McKINNEY: No, Your Honor.

THE COURT: All right. Very well. This cause stand in recess.

(Thereupon, the proceedings were completed at 1:09 p.m.)

[Reporter's Certificate omitted in printing]

Supreme Court, U. S.
FILED
NOV 7 1980
MICHAEL RODAK, JR., CLERK

No. 80-68

In the Supreme Court of the United States

OCTOBER TERM, 1980

KITTY LOUISE STROUSE and LORI GAY WINTER, by and through her natural mother and next friend, KITTY LOUISE STROUSE,
Petitioners,

VERSUS

GLENN DALE CARTER, Associate District Judge of the District Court of Pottawatomie County, Oklahoma,
Respondent.

On Writ of Certiorari to the Supreme Court of Oklahoma

REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November, 1980

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

Pursuant to Rule 22 the Petitioners respectfully reply to the Brief of Respondent in Opposition to Petition for Writ of Certiorari, filed by Bette Winter, Lori Gay Winter's grandmother, and adoptive mother, in lieu of the Respondent, Glenn Dale Carter, Associate District Judge of the District Court of Pottawatomie County, Oklahoma.

Contrary to the Respondent's statement, this case has not previously been before this Honorable Court. The prior case mentioned by the Respondent challenged on constitutional grounds, an Oklahoma Statute of Limitations per-

taining to adoptions, and it did not in any manner address the questions contained herein relating to the denial of due process and equal protection under the Fourteenth Amendment with regard to the child's best interests and her preference.

The Respondent takes the position that Title 30, Oklahoma Statutes, Section 11, relates to marriage and divorce and the statute is found in the title of marriages. This is not true. The said statute is found in the section of the statutes relating to guardian and ward and is a general statute which was enacted by the Oklahoma Territory Legislature prior to statehood as a guide in awarding custody of a minor and in appointing a general guardian. The statute is quoted in Statutory Provisions Involved, page two, of the Petition for Writ of Certiorari to the Supreme Court of Oklahoma.

The Respondent also states that the Petitioner, Lori Gay Winter, is residing with the Petitioner, Kitty Louise Strouse, her natural mother, in direct violation of an order of the District Court of Pottawatomie County, Oklahoma. The Court's attention is invited to the Order of the Oklahoma Supreme Court, Appendix A of the Petition, wherein the court said "Petitioner's Application to Assume Original Jurisdiction, Petition for Writ of Prohibition and Mandamus is DENIED without prejudice to 12 O.S. 1971, Section 1754 habeas corpus proceeding in Oklahoma, or under Kansas Law . . ." As pointed out on page 10 of the Petition, the Petitioners said that habeas corpus proceedings would be "available only to the grandmother, and then only, if the Petitioners refuse to abide by the Orders of the court regarding the surrender of the custody of the child . . ."

It appears that the Oklahoma Supreme Court recognized the importance of a hearing to determine the child's best interests, but it attempted to shift the responsibility to the Kansas courts. The Oklahoma Supreme Court seemed to endorse a plan of refusing to surrender the child in obedience of an Oklahoma court order and forcing the grandmother to go into the Kansas courts in a habeas corpus proceeding where the matter of best interests could be determined. The Petitioners are attempting to avail themselves of the alternative suggested by the Oklahoma Supreme Court.

Further, the Respondent attempts to convince the Court that the Petitioner, Kitty Louise Strouse, the child's natural mother, is not a foster parent and has no standing. The Respondent also states that all of the cases cited by the Petitioners pertain to divorce or full faith and credit or other matters not relating to adoptions. On the contrary, *Osborn* v. *Roberts,* 169 P.2d 293 (Okla. 1946), cited by the Petitioners on page 6 of the Petition, relates to a three-year-old child who had been residing with her aunt since her mother's death when the child was two days old. The natural father, in a habeas corpus proceeding, attempted to gain custody of the child, but the Oklahoma Supreme Court denied the writ. On page 294 of the opinion the court said, "... there are three rights or interests that are to be given consideration in the following order of importance (1) that of the child, (2) that of the parent, and (3) that of those who have for years discharged all the obligations of parents ..." Clearly, Kitty Louise Strouse, the natural mother, has discharged all of the obligations of a parent for approximately four and one-half years. It is also very clear that

the Oklahoma courts have completely ignored the interests of the child in this case. Kitty does in fact, have standing, and the Federal constitutional rights of the Petitioners have been violated.

Subsequent to the filing of the Petition for Writ of Certiorari to the Supreme Court of Oklahoma, House Bill No. 1741, enacted by the 1980 session of the Oklahoma Legislature, became effective on October 1, 1980. The act is known as the "Uniform Child Custody Jurisdiction Act" (See Appendix hereto).

Section 3 of the act states:

> "The provisions of this act shall apply to all custody proceedings brought within this State, whether as an initial proceeding or modification, and regardless of the absence of jurisdictional dispute."

Section 4 of the act contains definitions. Subsection 8 reads:

> " 'Physical custody' means actual possession and control of a child."

Subsection 9 provides:

> " 'Person acting as parent' means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody."

Section 5, subsection D reads:

> "The *controlling criteria* for *awarding custody* by a court of this state *shall always* be *what is in the best interest of the child, other statutory provisions merely being factors which may be considered.*" (Emphasis supplied)

The aforesaid act contains the provision that it shall be codified in the Oklahoma Statutes as Section 1601 through 1627 of Title 10, and as pointed out by the Respondent, Title 10 of the Oklahoma Statutes contains the provisions relating to the adoption of children.

CONCLUSION

Kitty Louise Strouse, the natural mother of Lori Gay Winter, was awarded her custody when the District Court of Pottawatomie County, Oklahoma vacated the decree of adoption on the 4th day of June, 1976. She has had the child's actual physical custody continuously and has been the person acting as a parent for a period of approximately four and one-half years. The Oklahoma Supreme Court has consistently considered the best interests of a child in awarding custody, except in this case. The legislative policy of Oklahoma since before statehood has been to consider best interests of a child in awarding custody or appointing a general guardian. This long-standing legislative policy has again been reiterated by the Oklahoma Legislature in the Uniform Child Custody Jurisdiction Act of 1980. But the Oklahoma courts have refused to consider Lori's best interests, in direct violation of her rights under the Equal Protection Clause and the Due Process Clause of the Four-

tenth Amendment. A Writ of Certiorari should issue to review the order and judgment of the Supreme Court of Oklahoma.

Respectfully submitted,

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November, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of November, 1980, three (3) true and correct copies of the foregoing Brief were served by placing same in the U. S. Mail, postage fully prepaid, addressed to Albert W. Murry, 3801 Classen Boluevard, Suite 200, Oklahoma City, Oklahoma 73118, Attorney for Respondent.

All parties required to be served have been served.

Murray Paul McKinney

APPENDIX

OKLAHOMA SESSION LAW SERVICE 1980

CHILDREN AND MINORS — UNIFORM CHILD CUSTODY JURISDICTION ACT

CHAPTER 285[58]

H.B. No. 1741

An Act relating to children; enacting the Uniform Child Custody Jurisdiction Act; providing short title; stating the purpose; providing application; providing certain definitions; providing certain jurisdiction in certain proceedings; providing for notice to certain persons; providing procedure when there are simultaneous proceedings in other states; providing for inconvenient forum; providing certain reasons court may decline jurisdiction; providing that certain information be submitted to court under oath; providing for certain additional parties; providing for appearance of certain parties; providing effect of custody decree; providing recognition; modification and registration of certain custody decrees; providing that certain copies of certain custody decrees be provided; providing method of taking testimony; requiring documents or a hearing or ordering an appearance of parties in another state; providing that District Court shall assist certain courts of another state and shall preserve certain documents for use in another state; providing certain international application; prohibiting certain acts; providing affirmative defenses; directing codification; and providing an effective date.

Be it enacted by the People of the State of Oklahoma:

SECTION 1. *Short title*

This act shall be known as the "Uniform Child Custody Jurisdiction Act".

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[58] 10 O.S. Supp. 1980, §§ 1601 to 1627.

SECTION 2. *Purpose of act*

The general purposes of this act are to:

1. Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

2. Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

3. Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

4. Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

5. Deter abductions and other unilateral removals of children undertaken to obtain custody awards;

6. Avoid relitigation of custody decisions of other states in this state insofar as feasible;

7. Facilitate the enforcement of custody decrees of other states;

8. Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

9. Make uniform the law of those states which enact it.

SECTION 3. *Application of act*

The provisions of this act shall apply to all custody proceedings brought within this state, whether as an initial proceeding or modification, and regardless of the absence of jurisdictional dispute.

SECTION 4. *Definitions*

As used in this act:

1. "Contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

2. "Custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligations of any person;

3. "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect or dependency proceedings;

4. "Decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree or a modification decree;

5. "Home state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months, and in the case of a child less than six (6) months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period;

6. "Initial decree" means the first custody decree concerning a particular child;

7. "Modification decree" means a custody decree which modified or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

8. "Physical custody" means actual possession and control of a child;

9. "Person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody; and

10. "State" means any state, territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia.

SECTION 5. *Prerequisites for jurisdiction*

A. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

1. This state:
   a. is the home state of the child at the time of commencement of the proceeding, or
   b. had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state;
2. It is in the best interest of the child that a court of this state assume jurisdiction because:
   a. the child and his parents or the child and at least one contestant, have a significant connection with this state, and

b. there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships;

3. The child is physically present in this state and:

a. the child has been abandoned, or

b. it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

4. a. It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs 1, 2, or 3 of this subsection, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and

b. it is in the best interest of the child that this court assume jurisdiction.

B. Except under paragraphs 3 and 4 of subsection A of this section, physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

C. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

D. The controlling criteria for awarding custody by a court of this state shall always be what is in the best intest of the child, other statutory provisions merely being factors which may be considered.

SECTION 6. *Right to notice and opportunity to be heard*

Before making a decree under this act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to Section 7 of this act.

* * * * *

SECTION 28. *Codification*

Section 1 through 27 of this act shall be codified in the Oklahoma Statutes as Sections 1601 through 1627 of Title 10, unless there is created a duplication in numbering.

SECTION 28. *Effective date*

This act shall become effective October 1, 1980.